United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7483

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-7483

STANLEY V. TUCKER

Appellant,

vs.

PAUL B. CRIKELAIR, ET ALS

Appellees.

BRIEF OF APPELLEE JUSTICE COTTER

On Appeal From The United States District Court
For The District Of Connecticut

For Appellee,
John P. Cotter, individually
and in his capacity as Chief
Court Administrator
for Connecticut

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INDEX

INDEX
(Continued)

TABLE OF CITATIONS

CASES

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES

OTHER AUTHORITIES

ISSUE

Was not the District Court correct in dismissing a pro se challenge to the constitutionality of the Connecticut mortgage foreclosure statutes where it was obvious that the claims were completely frivolous?

STATEMENT OF THE CASE

This action, brought by a pro se plaintiff under civil rights and other jurisdictional grounds,[1/] sought to raise various constitutional challenges to the Connecticut mortgage foreclosure statutes, §§ 49-14, 49-25, 49-27 and 49-28, Conn. Gen. Stat. As noted by the District Court,

> "This lawsuit [was] another in his continuing effort to delay, and perhaps prevent, the enforcement of state and federal judgments entered against him in California."
>
> Memorandum Of Decision, A. - H-1.

The background of this litigation is further detailed in the Memorandum Of Decision, A. - H-1-2, n. 1, and in such prior related cases as Anderson v. Tucker, 68 F.R.D. 461 (D. Conn. 1975); Tucker v. Maher, 497 F.2d 1309. (2d Cir. 1974), and Tucker v. Moller, 445 F.2d 1400 (2d Cir. 1971).

Damages were sought against the private defendants who were judgment lienors. In addition, declaratory and injunc-

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1/ Jurisdiction was claimed under 28 U.S.C. §§ 1331, 1332, 1343 (1), (2), (3) and (4) as well as 1655, 2201, 2202, 2281 and 2284. Complaint, ¶ 2, (A. - A-1).

tive relief was demanded against them as well as the Honorable John P. Cotter, Justice of the Connecticut Supreme Court and Chief Court Administrator. The Complaint was dismissed for failure to state a claim upon which relief may be granted, pursuant to Rule 12(b) (c), Federal Rules of Civil Procedure.

ARGUMENT

A. MORTGAGE FORECLOSURE STATUTORY PROCEDURE.

Before we address the specific legal contentions of the plaintiff - appellant which were contained in paragraphs 5A through F, inclusive of the Complaint, it would be helpful to discuss briefly the background and purpose of the statutes in question as well as their basic operation. Judgment liens may be foreclosed or redeemed in the same manner as mortgages. Section 49-46, General Statutes. This brings us to the mortgage foreclosure provisions. Under common law concepts, a mortgage passed legal title to the mortgagee subject only to the performance of a condition subsequent, namely, payment by the mortgagor. In the

event of non-payment on the specified date or dates, there was an automatic forfeiture so that the mortgagee then obtained absolute title, free and clear.

Courts of equity, however, looked to the intent rather than the form of mortgage transactions and alleviated the harsh consequences of non-payment. Notwithstanding the automatic forfeiture at law for non-payment, the mortgagor was provided with an equity of redemption. This took the form of an opportunity to pay the debt by a subsequent law day to be designated by the Court in spite of the previous default. This extension of time was based upon the equitable consideration that the severe common law forfeiture was, in essence, a penalty which equity should provide relief against. See generally, Louisville Joint State Land Bank v. Radford, 95 U.S. 555 at 578-9 (1935); Petterson v. Weinstock, 106 Conn. 436 at 441-2 (1927); 4 Pomeroy Equity Jurisprudence, 5th Ed. (1941) Sec. 1179 at p. 521, Sec. 1180 at p. 523, and Sec. 1181 at p. 524.

On the basis that equity treats everything done which in good conscience ought to be done, the mortgagor was deemed

to have the right to compel reconveyance and redelivery of the property at any time upon payment of the debt. The mortgagee was considered to have legal title only for the purposes of security. As against all other persons, the mortgagor was held to be the legal owner for all intents and purposes. 2 Pomeroy, supra, Sec. 376 at p. 388; 4 Pomeroy, supra, Sec. 1187 at p. 533. Thus, even in a "title" state such as Connecticut the nature of the property interests has been recognized as follows:

> "...While the mortgagee holds the legal title to the land he is regarded in equity as doing so only for the purpose of securing the payment of the debt...."
>
> Desiderio v. Iadonisi, 115 Conn. 652 at 654 (1932).
>
> See also: State v. Stoneybrook, Inc. 149 Conn. 492 at 496 (1962), Hartford Realization Co. v. Travelers Insurance Co., 117 Conn. 218 at 224 (1933).

Originally, mortgages were enforceable by the mortgagee by strict foreclosure. Upon the failure of the mortgagor to redeem by the designated law day, the equity of redemption was extinguished and the mortgagee became absolute

owner. The mortgagee could not seek any deficiency judgment in the foreclosure proceeding. Instead, any loss he sustained based upon the difference between the debt and the value of the property foreclosed could only be recovered in a separate action on the debt. The need to resort to a separate action, however, was eliminated by the Connecticut General Assembly by the passage of Chapter 18 of the Public Acts of 1833. This provision allowed the mortgagee to obtain a deficiency judgment in the strict foreclosure proceeding itself. This statutory provision has been considered as a necessary correction in light of equitable principles. The purpose is to provide complete justice and unity of relief in one proceeding so that a multiplicity of suits can be avoided, if possible. See generally, Beach v. Isacs, 105 Conn. 169 at 170 (1926); Equitable Life Assurance Society v. Slade, 122 Conn. 451 at 454 (1937). It is further noted that a foreclosure of a mortgage is now a bar to any further action upon the mortgage debt against all persons who are liable for the payment and who are either made parties to the foreclosure or who could have been made parties. See § 49-1, Conn. Gen. Stat.

In addition, in a foreclosure proceeding the Court in its discretion may order that the mortgage be foreclosed by a decree of sale instead of strict foreclosure. Section 49-24 et seq., Conn. Gen. Stat. A supplemental judgment is then rendered specifying the parties entitled to a disbursement of the funds. Section 49-27, Conn. Gen. Stat.[2/] For general history and operation of the mortgage foreclosure statutes, see Comment, Connecticut Mortgage Foreclosure: Deficiency Judgments And Problems Of Subsequent Encumbrancers, 2 Conn. L. Rev. 413 (1969-70); Note, An Act Concerning The Foreclosure Of Mortgages, 32 Conn. Bar J. 200 (1958).

We have set forth this background in some detail because the arguments raised by the plaintiff can be properly evaluated in light of the history of these provisions.

1. PLAINTIFF'S CLAIM THAT SECTION 49-14, CONN. GEN. STAT. DOES NOT PERMIT DEFICIENCY JUDGMENTS IN FAVOR OF THE DEFENDANT (¶5A, COMPLAINT).

The plaintiff - appellant's arguments can best be dealt with by referring to the Complaint itself. In paragraph 5A the plaintiff contends that § 49-14, Conn. Gen. Stat.

2/ The foreclosure by sale provisions were first enacted as §§ 2 and 6 of Ch. 109 of the Public Acts of 1887. See Cronin v. Gager-Crawford, 128 Conn. 688 at 694 (1942).

is unconstitutional

> "because it permits deficiency judgments for plaintiffs where the claim exceeds the appraisal but does not permit deficiency judgments in favor of the defendant where the appraisal exceeds the claim."

It is well recognized that "the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control." Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co., 284 U.S. 151 at 158 (1931). It is also well established that a person has no vested interest in any one rule of law. Consistent with due process requirements, property rights are subject to reasonable state regulation. Munn v. Illinois, 94 U.S. 113 at 134 (1871). As to equal protection,

> "'[T]he Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways, Barbier v. Connolly, 113 U.S. 27 [5 S.Ct. 357, 28 L.Ed. 923] (1885); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 [31 S.Ct. 337, 55 L.Ed. 369] (1911); Railway Express Agency v. New York, 336 U.S. 106 [69 S.Ct. 463, 93 L.Ed. 533] (1949); McDonald v. Board of Election Commissioners, 394 U.S. 802 [89 S.Ct. 1404, 22 L.Ed. 2d 739] (1969)....'"
>
> Reed v. Reed, 404 U.S. 71 at 75 (1971).

> "The distinctions drawn by a challenged statute must bear some rational realtionship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal...."
>
> McDonald v. Board of Election Commissioners, 394 U.S. 802, 808-809 (1969).
>
> "'The problems of government are practical ones and may justify, if they do not require, rough accommodations,--illogical, it may be, and unscientific.'"
>
> Metropolis Theatre Co. v. Chicago, 228 U.S. 61, 69-70 (1913).
>
> See also: New York Central Railway Co. v. White, 243 U.S. 188 at 201, 202 (1916); Gentile v. Altermatt, 169 Conn. 267 (1975), 37 Conn. L.J. No. 6, Aug. 5, 1975, p. 1, Appeal dismissed, 96 S.Ct. 763-4 (Jan. 12, 1976) (upholding the constitutionality of the Connecticut "no-fault" law, §§ 38-319 et seq.)

In a strict foreclosure proceeding the mortgagor's interest in redeeming the property is considered by the Court when it sets a law day by which payment must be made. In setting the law day the Court will consider the value of the mortgaged premises when compared with the debt. At this stage, both parties have a right to offer testimony on the issue of value, subject to cross-examination and the usual evidentiary rules. If the value of the premises substantially exceeds the

mortgage debt, the mortgagor will be given a longer period in which to redeem. This would permit him to either obtain refinancing if possible or to sell the property itself on the open market and retain the difference between the proceeds and the mortgage debt. This procedure is considered more advantageous to both parties than an immediate, court ordered sale under distressed conditions.

This system was discussed by the State Supreme Court in Brand v. Woolson, 120 Conn. 211 (1935):

> "In most jurisdictions the foreclosure is by a sale of the property and the time for redemption is fixed by statute. In this jurisdiction, except when, upon written motion, the court in its discretion decrees a sale, a mortgage is foreclosed by strict foreclosure, and the time for redemption is fixed by the court. Though this has been characterized as a severe remedy, it has been considered 'more convenient and equitable to give the party himself a reasonable time to effect a sale which can probably be done by him at a much greater advantage than by a forced sale at auction.' 2 Swift's Digest, 198.
>
> "The procedure has always been that outlined by CHIEF JUSTICE SWIFT: 'On an application for a foreclosure the court will ascertain the sum that is due on the mortgage, and enquire into the value of

the mortgaged premises, and will limit a time for redemption having regard for the value of the [mortgaged] premises when compared with the debt. If the land is worth about the amount of the debt or less, they will give but a short time; if the value of the land considerably exceeds the debt, so that it is an object to redeem, they will give a proportional time according to the circumstances of the case to prevent a sacrifice of the property; but no precise period has been established.' 2 Swift's Digest, 197.

"The flexibility of the procedure which permits the court to exercise its discretion in fixing the law day as to protect the rights of all parties modifies any severity that may be thought to inhere in this method of foreclosure. The discretion exercised by the court in fixing the law day in a foreclosure is a legal discretion. Its exercise will not be interfered with on appeal to this court except in a case of manifest abuse and when injustice appears to have been done. Hayward v. Plant, 98 Conn. 374, 382, 119 Atl. 341. When it appears that there is an equity in the mortgaged property so that it is an object for the mortgagor to redeem, the court in fixing the law day may properly take into consideration the probability that the necessary money can be procured within the time limited for redemption. The difficulty of raising money, under existing conditions, upon any kind of security, is a matter of common knowledge. If an 'emergency may furnish the occasion for the exercise of power,' as was said in Home Building & Loan Asso. v. Blaisdell, 290 U. S. 398, 426, 54 Sup. Ct. 231, upholding

> a Minnesota statute providing for an extension of the statutory time for redemption of a mortgage, it may well furnish the occasion for an exercise of discretion in fixing a law day beyond a time which the court would feel justified in granting under normal condiditons...."
>
> Id. at 214-215.

The protection for the mortgagor under strict foreclosure has also been explained as follows:

> "...The judicial answer, so far, has been that the interests of the mortgagor can be adequately protected by a proper handling of the strict foreclosure process. Having in mind that the time fixed for redemption by the decree nisi need not necessarily be six months or any other sacrosanct period, and that, indeed, the period can be extended, one can understand why the Connecticut courts seldom find it necessary to order a sale...."
>
> 1 Glenn, MORTGAGES, Deeds Of Trust, And Other Security Devises As To Land, § 67 at 419 (1943).

Furthermore, where the equity in the property exceeds the mortgage debt the Court also in its discretion may authorize foreclosure by sale upon the motion of any party. Section 49-24, Conn. Gen. Stat.; Bradford Realty

Corp. v. Beetz, 108 Conn. 26 at 31 (1928). However, because of the additional expense and possibly unfavorable sale conditions, this procedure is resorted to less frequently than strict foreclosure.

In summary, the excess equity of the mortgagor is protected by the discretion of the Court in designating the law day for equity of redemption as well as the alternative of judicial sale when deemed warranted.

2. PLAINTIFF'S CLAIM THAT SECTION 49-14 PRECLUDES A JURY TRIAL AND THE PRESENTATION OF EVIDENCE AS TO VALUE (¶ 5B OF COMPLAINT).

Plaintiff next argues that Section 49-14, Conn. Gen. Stat., is unconstitutional

> "...by precluding a jury trial as to value and by precluding the introduction of testimony, presentation of witnesses and the right to confront witnesses and to cross-examine witnesses as to value."

a. JURY TRIAL.

We will first discuss the jury trial question. It is well established that the Seventh Amendment of the United States Constitution, preserving a right of jury

trial in suits at common law, does not apply to the states. Minneapolis and St. Louis Railway Co. v. Bombolis, 241 U.S. 211, 217 (1916); See also Brady v. Southern Railway Co., 320 U.S. 476, 479 (1943); Hardware Dealers Mutual Fire Insurance Co. v. Glidden, supra, 284 U.S. at 158 (1931); Mountain Timber Co. v. Washington, 243 U.S. 219 at 235 (1916).

Although the Supreme Court has held that the Sixth Amendment of the Federal Constitution, concerning the right to jury in criminal proceedings, is incorporated in the due process clause of the Fourteenth Amendment, it has also emphasized the distinction between criminal and civil cases for this purpose. Duncan v. Louisiana, 391 U.S. 145 at 155 (1968). It has been uniformly recognized that the Seventh Amendment is not extended to the states by the "incorporation" doctrine. Melancon v. McKeithen, 245 F.Supp. 1025 (E.D. La. 1972, 3-judge District Court, Wisdom, J.), Aff'd, 409 U.S. 943 (1972). In fact, the Supreme Court has recently noted:

> "The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment...."

> Curtis v. Loether, 415 U.S. 189 at 192, n.6 (1974).
>
> See also: Colgrove v. Battin, 413 U.S. 149, 169, n.4 (1973), Marshall, J. dissenting.

Concerning the right to a jury under State law, it is generally recognized that the jury rights preserved under Article First, Section 19, of the Connecticut Constitution, as amended by Article IV, apply only to actions which were triable to a jury at the time of the adoption of the 1818 Constitution. Gentile v. Altermatt, supra. Similarly, the statutory restatement of these provisions excludes from jury requirement actions involving a question "properly cognizable in equity...." Section 52-215, Conn. Gen. Stat. See also II Stevenson, Connecticut Civil Procedure (2d Ed. 1971), Section 175e, pp. 693-696.

The fact that monetary relief is claimed in a foreclosure proceeding does not itself entitle the litigants to a jury trial.

> "[W]here the essential right asserted is equitable in its nature and damages are sought in lieu of equitable relief or as supplemental to it in order to make that relief complete, the whole action is one in equity and there is no right to a jury trial.' Berry v. Hartford National Bank & Trust Co., supra, 618, 619."

> Savings Bank of New London v. Santaniello, 130 Conn. 206 at 210 (1943), involving a mortgage action. See also Pernell v. Southall Realty, 416 U.S. 371 at 375-376 (1974).

Even with the addition of the statutory right to a deficiency judgment in foreclosure, the following principle was well established:

> "In a suit to foreclose a mortgage the court will ordinarily treat the case as a unity, and as one of exclusive equitable jurisdiction."
>
> 1 Pomeroy, Equity Jurisprudence, supra, Sec. 2401, p. 450.

Thus, it has been specifically held that the right to a jury trial under state constitutional provisions comparable to Connecticut's does not apply to mortgage foreclosure proceedings even where a deficiency judgment is sought. Jamaica Savings Bank v. M. S. Investing Co., Inc., et al, 274 N.Y. 215, 8 N.E. 2d, 493 (1937), wherein the Court stated:

> "An action to foreclose a mortgage is an action in equity. As incidental to the main relief sought, the court ever since 1830 may award

> judgment for the deficiency after sale. This relief is purely incidental, and a complaint asking such relief states only one cause of action. In Reichert v. Stilwell, 172 N.Y. 83, 88, 64 N.E. 790, 792, the court said: 'An action to foreclose a mortgage is not an action to recover the mortgage debt from the mortgagor personally, but to collect it out of the land by enforcing the lien of the mortgage. ...The Revised Statutes authorize the court in an action of foreclosure to render judgment against the person liable for the mortgage debt for any deficiency that may remain after selling the land and applying the proceeds. * * * That, however, is not a distinct and independent cause of action, but is an incidental remedy, dependent wholly upon the statute and subsidiary to the main object of the action.'"
>
> Id. at 494.

Further, it is significant that these considerations apply in original federal actions.

> "Since a foreclosure action is equitable and the granting of a deficiency judgment is an incident of the equitable jurisdiction, it follows that there is no right of jury trial as to the plaintiff's claim including his right to a deficiency judgment....The action of the Court is consistent only with the proposition that equity having taken jurisdiction of the

> foreclosure suit should have jurisdiction to determine the incidental matter of a deficiency judgment and that there is no right of jury trial on any of these issues...."
>
> 5 Moore's Federal Practice, (2d Ed. 1976) ¶38.38[4] at pp. 308.12-308.13.
>
> See also: Judge Friendly's extensive analysis in Damsky v. Zavatt, 289 F.2d 46 at 53-55 (2d Cir. 1961) and Shepherd v. Pepper, 133 U.S. 626 at 652 (1890).
>
> See generally 3 Jones, Mortgages, § 1840 at p. 318 (1928); 1 Glenn, Mortgages, (1943), §§ 60, 77.1, 89.1.

Wholly aside from these principles, it should also be noted that in Connecticut the Court in its discretion may order that issues of fact in any equitable proceeding should be tried by a jury. 1 Connecticut Practice Book (1975), Sec. 243; Sec. 52-218, Conn. Gen. Stat.

In summary, there is no cognizable right, federal or otherwise, to a jury trial where a deficiency judgment is sought in a foreclosure case, even though the Court in its discretion may refer certain fact questions to a jury if deemed appropriate.

b. PRESENTATION OF EVIDENCE AND CROSS-EXAMINATION.

Plaintiff also attacks the constitutionality of Section 49-14, Conn. Gen. Stat., on the basis that it does not permit the presentation of evidence as well as cross-examination on the question of value. This provision states that the appraisal "shall be final and conclusive." The appraisal report is submitted by three "disinterested appraisers" under oath who are appointed by the Court. Section 49-14. The background and operation of this provision was discussed in Equitable Life Assurance Society v. Slade, supra, 122 Conn. at 454-459. Originally, the determination of value was a function of the Court itself. This duty was transferred to the three disinterested appraisers by Section 2 of Chapter 129 of the Public Acts of 1878. The appraisers are deemed to act in a "quasi-judicial capacity." Id. at 455. A remonstrance lies against their report for any irregularity. It is true that alleged errors of judgment as to the value of the property cannot be reviewed in the remonstrance. However, mistakes of fact or law which substantially affected the property appraisal may be considered. Id. at 459.

> "In no case can an appraisal so determined be set aside in the absence of a showing of some serious mistake of fact or the adoption of an erroneous principle of law which substantially affected it as made by the three considered as a joint board...."
>
> Id. at 458.

This analysis of the Court's limited function in reviewing an appraisal report in a foreclosure proceeding is consistent with the principles stated in 2 Wiltsie, Mortgage Foreclosure, (5th Ed. 1939), Section 647 at pages 1048-1050.

The constitutionality of this procedure was specifically upheld in Buck v. Morris Park, Inc., 153 Conn. 290 (1965). A claim of unconstitutionality similar to that in the present case was made. The Court first recognized that the appraisal was a quasi-judicial act distinguishable from the function of a committee in assessing damages in eminent domain. The Court then stated:

> "...An appraiser sets a value on property at his estimate of what it is worth. Beach v. Trumbull, 133 Conn. 280, 290, 50 A.2d 765; Cocheco Mfg. Co. v. Strafford, 51 N.H. 455, 482; McAdams v. Bolsinger, 57 Ohio Op. 338, 340, 129 N.E.2d 878. The

appraisers determine the value of property upon their own experience and judgment. Consequently, they are not required to hear evidence or to give notice of the meeting at which they make the appraisal. Vincent v. German Ins. Co., 120 Iowa 272, 278, 94 N.W. 458.

"General Statutes §49-14 provides that the appraisal made thereunder shall be final and conclusive as to the value of the mortgaged property. Upon a remonstrance being filed, the power of the court to review the question of value is limited to questions of law. Equitable Life Assurance Society v. Slade, 122 Conn. 451, 456, 190 A. 616. The constitutional due process requirements are satisfied where the complainant has had reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it. Dohany v. Rogers, 281 U.S. 362, 369, 50 S. Ct. 299, 74 L. Ed. 904; Missouri ex rel. Hurwitz v. North, 271 U.S. 40, 42, 46 S. Ct. 384, 70 L. Ed. 818; Proctor v. Sachner, 143 Conn. 9, 17, 118 A.2d 621. It must be born in mind that this was an action for the foreclosure of a mortgage on the defendant's property. The mortgage was the security for the money loaned to the defendant. It appeared and participated in the foreclosure. It obtained an extension of the law day by stipulation with the plaintiff and had

> the opportunity to redeem but did not do so. It had notice of the appointment of the three appraisers and in fact nominated one of those selected. It also had notice of the motion for deficiency judgment and was fully heard on its remonstrance to the acceptance of the appraisers' report. Nothing more was required to protect the rights of the defendant. The due process clause in the federal constitution does not guarantee any particular form or method of state procedure to the citizens of the state. Proctor v. Sachner, supra."
>
> Id. at 293-294.

It is significant that the United States Supreme Court dismissed an appeal which was taken from this decision for want of a substantial federal question. 385 U.S. 2 (1966) (per curiam). See also Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co., supra, 284 U.S. 151.

3. PLAINTIFF'S CLAIM THAT SECTION 49-25 PRECLUDES A JURY TRIAL AND THE PRESENTATION OF EVIDENCE AS TO VALUE (¶ 5C OF COMPLAINT).

Plaintiff's attack on Section 49-25, Conn. Gen. Stat., concerning foreclosure by sale is virtually identical to that made to Section 49-14 above. As to the jury trial

question, it is well recognized that a foreclosure by sale is also an equitable action. City Savings Bank v. Lawler, 163 Conn. 149 at 155 (1972); Mariners Savings Bank v. Duca, 98 Conn. 147 at 152 (1922). Therefore, there is no right to a jury trial for reasons stated above.

In respect to the issue of presentation of evidence, it is noted that Section 49-25 contains no language that the appraisal is final and conclusive. Therefore, it has been held that the appraisal is not binding upon the Court in this situation. Cronin v. Gager-Crawford Co., 128 Conn. 688 at 692 (1942). It would thus appear that the Court is not precluded from hearing evidence on this issue. Furthermore, the value of the property for the purpose of the deficiency is determined by the purchase price at the foreclosure sale. The appraisal is utilized only for the purpose of providing an additional credit to the mortgagor as we shall discuss more fully below, as well as for determining whether the sale should be ratified. See Id. at 695; Section 49-28, Conn. Gen. Stat. Finally, the Court has the power to disapprove a sale "if found to be unfair or inequitable to any

of the parties." Cronin v. Gager-Crawford Co., supra, at 693; Mariners Savings Bank v. Duca, supra, at 152-156.

4. PLAINTIFF'S CLAIM THAT SECTION 49-27 REQUIRES THE PLAINTIFF TO BRING INTO COURT ONLY THE PROCEEDS EXCEEDING THE DEBT. (¶ 5D OF COMPLAINT).

This is a challenge to that portion of Section 49-27, Conn. Gen. Stat., which provides that if the plaintiff is the purchaser at the foreclosure sale, "[H]e shall be required to bring into court only so much of such proceeds as exceed the amount due upon his judgment debt, interest and costs." This is only a bookkeeping provivision which avoids the need for the plaintiff to first pay the amount of his judgment debt at the sale only to have it returned again on disbursement of the sale proceeds. In fact, the portion which the plaintiff pays into Court would generally represent any excess of the sales price over the debt and thus be subject to apportionment among other parties, including the mortgagor.

Contrary to Tucker's assertions, the mortgagor is not required to "bring" into Court anything. He had already obligated himself to payment of the mortgage debt.

5. PLAINTIFF'S ATTACK UPON THE FIFTY PER CENT CREDIT IN SECTION 49-28 (¶ 5E OF COMPLAINT).

The only portion of this allegation which requires any comment is the claim that Section 49-28, Conn. Gen. Stat., "does not permit deficiency judgments to have deducted the full loss sustained by defendants where the sales price is less than the appraisal but only requires one-half of the difference between selling price and the appraised value to be deducted from the debt or deficiency judgment." It is obvious that this statute is remedial and seeks to compensate the mortgagor for at least part of the loss sustained by a forced auction sale requested by the mortgagee. As stated by the Court in Cronin v. Gager-Crawford Co., supra,

> "...It is just and equitable that the party who asks and obtains an order of sale in place of a decree of strict foreclosure, with the resultant sacrifice of value which a sale is likely to involve, if he seeks a deficiency judgment should bear a part of the value sacrificed by the forced sale. North End Bank & Trust Co. v. Mandell, 113 Conn. 241, 245, 155 Atl. 80...."
>
> Id. at 691-692.

It is recognized that the value obtained by a compulsory liquidated sale may very well be less than that which could be realized upon a more orderly disposition by the mortgagee after a strict foreclosure decree. See Staples v. Hendrick, 89 Conn. 100 at 106-107 (1915). For these reasons, the constitutionality of statutes such as Section 49-28 has been well established. Honeyman v. Jacobs, 306 U.S. 539 (1938); Gelfert v. National City Bank, 313 U.S. 221 (1941).

6. FURTHER ALLEGATION OF UNCONSTITUTIONALITY (¶ 5F OF COMPLAINT).

This allegation is merely surplusage.

B. CLAIM THAT JUSTICE COTTER WAS NOT ENTITLED TO REPRESENTATION BY ATTORNEY GENERAL FRIVOLOUS.

The claim that the Court should have stricken the appearances of members of the Attorney General's office who have represented Justice Cotter in these proceedings is completely frivolous. Pursuant to Section 3-125 of the General Statutes, the Attorney General "shall have general supervision over all legal matters in which the state is an int-

erested party...." Furthermore, if a Federal Court action involves the enforcement of a state statute, prior notice must be given not only to the Governor but also to the Attorney General of the state in accordance with 28 U.S.C.A., Section 2284(2).

It has also been held that federal judges who are the subject of suits are entitled to be represented by the United States Attorney. Jones v. Fire & Casualty Insurance Co. of Connecticut, et al, 266 F.Supp. 91 (D. Conn. 1967). In that case a pro se plaintiff sued a U. S. District Judge who had presided over his criminal trial in North Carolina. The civil action was heard in the District of Connecticut and the North Carolina Judge was represented by the United States Attorney for the Western District of North Carolina. The plaintiff objected to the representation of the Judge by the federal attorney. Judge Blumenfeld dismissed this contention out of hand, stating:

> "In his objection to this motion, Jones states that the government attorney has no standing. The Judge is a member of the government, and as such, the United States Attorney is his counsel. The objection is fatuous."
>
> Id. at 92, n.1.

C. THREE-JUDGE DISTRICT COURT NOT WARRANTED.

In addition to the authorities previously cited, it should be pointed out that the United States Supreme Court has recognized that state foreclosure procedures similar to Connecticut's are enforceable in the Federal District Courts. These rulings have involved provisions for redemption of land after the entry of a foreclosure decree. See 2 Moore's Federal Practice ¶ 2.09 at pp. 443-445, ns. 58, 59 (2d Ed. 1975). See also Brine v. Hartford Fire Insurance Co., 96 U.S. 627 (1877); Orvis v. Powell, 98 U.S. 176 (1878); Connecticut Mut. L. Ins. Co. v. Cushman, 108 U.S. 51 (1882).

This is significant because a three-judge Court is not warranted where prior decisions of the United States Supreme Court "'inescapably rendered the claims frivolous.'" Hagans v. Levine, 415 U.S. 528 at 539 (1974). It is clear that the Complaint as well as the Appeal are "'essentially fictitious,"" "'wholly insubstantial,'" and "'obviously frivolous'" within the meaning of this rule. Id at 538.

C O N C L U S I O N

Accordingly, it is respectfully submitted that the judgment of the Court below should be affirmed.

D E F E N D A N T,

JOHN P. COTTER, individually
and in his capacity as
Chief Court Administrator
for Connecticut

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CERTIFICATION

This is to certify that a copy of the above Brief was mailed, via U. S. Mail, Postage Prepaid, this 29th day of December, 1976 to: Stanley V. Tucker, Box 35, Hartford, Connecticut 06101 and Robert R. Anderson, Esq., 621 E. Main Street, Santa Paula, California 93060.

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